SLAYTON, PENITENTIARY SUPERINTENDENT v. SMITH

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 70-108. Decided November 16, 1971

Court of Appeals, having determined that state remedies had not been exhausted by respondent, whose habeas corpus petition alleged that he had been tried and sentenced by a senile state judge, should not have made implications as it did as to merits of the delicate subject involved and, absent special circumstances, should not have ordered the District Court, which had dismissed the petition, to retain the case on its docket until respondent had sought state court relief.

Certiorari granted; 435 F. 2d 453, vacated and remanded.

PER CURIAM.

Respondent's petition for habeas corpus alleged, among other things, that he had been tried and sentenced in the state courts by a senile judge. On appeal from the District Court's dismissal of the petition without a hearing, the Court of Appeals for the Fourth Circuit noted that state remedies had not been exhausted, expressed its confidence that "if the contention is squarely raised, the state courts will be willing to afford the petitioner a reasonable opportunity to prove his case," and observed that a claim of judicial senility raised a most "sensitive issue of state administration of state criminal justice." 435 F. 2d 453, 460 (1970). Despite these judicious observations underscoring the fact that this case was not ripe for federal cognizance, the Court of Appeals vacated the District Court's judgment and remanded for further proceedings with instructions to stay the case until respondent had sought relief in the Virginia state courts.

The Court of Appeals' form of "abstention" is perhaps technically consistent with the statutory prohibition

against issuing the writ where state remedies have not been exhausted. 28 U. S. C. § 2254. But, having determined that state remedies had not been exhausted, the Court of Appeals would have better served the policy of the statute had it avoided any implication as to the merits of so delicate a subject. Further, absent special circumstances, cf. *Nelson* v. *George*, 399 U. S. 224 (1970), *Wade* v. *Wilson*, 396 U. S. 282 (1970), rather than ordering retention of the case on the District Court's docket, the Court of Appeals should simply have vacated the judgment of the lower court and directed dismissal of the petition for failure to exhaust state remedies.

The motion of respondent for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted, the judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART joins, believing that the Court of Appeals has observed all the proprieties as well as the requirements of the Act, would affirm its judgment.